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7 VENTON SMITH,  
8 Plaintiff,  
9 v.  
10 UNITED PARCEL SERVICE, INC., et al.,  
11 Defendants.

Case No. [20-cv-09460-EMC](#)

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

Docket No. 18

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14 Plaintiff was a car wash employee at United Parcel Service, Inc. (“UPS”) who alleges that  
15 he suffered discriminatory and harassing treatment from his UPS supervisors. He took medical  
16 leave in 2017 and never returned to work, and he alleges that UPS effectively terminated him in  
17 retaliatory fashion for reporting unsafe working conditions. Plaintiff filed a complaint in San  
18 Francisco County Superior Court, naming UPS, United Parcel Service General Services Co.,  
19 United Parcel Service Co., Donald Embers, Gregory Price, and Does 1-20 as Defendants, and the  
20 case was removed to federal court.

21 UPS has filed a Motion to Dismiss Plaintiff’s PAGA claims, Cal/OSHA claims, and the  
22 claim for wrongful termination in violation of the Fair Employment and Housing Act (“FEHA”).  
23 Docket No. 18.

24 **I. BACKGROUND**

25 In the complaint, Plaintiff alleges as follows.

26 Plaintiff was hired and began his employment at UPS on or around September 26, 2016.  
27 Compl. ¶ 17. Plaintiff is legally blind in his right eye. *Id.* ¶ 24. He alleges that he observed a  
28 violent and unsafe work environment that was created by his supervisors, Donald Embers and

1 Gregory Price. *Id.* ¶ 18. Embers and Price directed their violent conduct toward a car wash  
2 employee named “AP” who filed grievances against them. *Id.* Embers openly encouraged other  
3 car wash employees to harass and retaliate against AP for the past grievances he had filed with  
4 UPS’s human resources department and the local union. *Id.* ¶ 20. For instance, employees were  
5 instructed to block AP’s personal vehicle with a locked UPS vehicle. *Id.* ¶ 23.

6 When Plaintiff provided his supervisors with documentation of his physical disability, he  
7 was met with derogatory comments (*e.g.*, “UPS only hires the handicap” and “You really are  
8 blind, I could punch you in your blind eye and you wouldn’t feel a thing”). *Id.* ¶ 24. And when  
9 Plaintiff refused to participate in the harassment of AP, Price and Embers refocused the bullying,  
10 harassment, and intimidation on him. *Id.* ¶ 26. Price threatened Plaintiff with bodily harm and  
11 Plaintiff experienced some of the same harassment that AP did. *Id.* ¶ 28. Namely, car wash  
12 employees blocked Plaintiff’s personal vehicle with a locked UPS truck and moved service  
13 vehicles to create more work for him. *Id.* On April 12, 2017, Embers and Price verbally  
14 confronted Plaintiff in Embers’ office, which led several members of UPS senior management to  
15 intervene. *Id.* ¶¶ 30-31. Plaintiff subsequently filed grievances with the human resources  
16 department at UPS and the local union, alleging a hostile work environment. *Id.* ¶¶ 32-34.  
17 Plaintiff claims that his grievances went unresolved and his supervisors continued their  
18 harassment and intimidation in April 2017, discussing ways to use his visual impairment to create  
19 a vehicular accident that would lead to his termination. *Id.* ¶ 36.

20 Plaintiff left on medical leave in April 2017. *Id.* ¶ 37. Before doing so, he informed UPS  
21 management that UPS employees were carrying weapons into the facility, and of an unsecured  
22 rooftop entrance. *Id.* Throughout May 2017, Plaintiff unsuccessfully attempted to contact Sheila  
23 O’Mahony, of UPS human resources, regarding his prior grievances. *Id.* ¶¶ 38-40. On June 17,  
24 2017, while on medical leave, Plaintiff filed an ADA accommodation application for a reduction  
25 in his work week from 40 hours to 35 hours due to visual impairments resulting from straining in  
26 his left eye. *Id.* ¶ 42. Thereafter, Plaintiff filed a complaint with the Equal Employment  
27 Opportunity Commission, detailing his concerns about discrimination, retaliation, and unsafe  
28 working conditions. *Id.* ¶ 44. Plaintiff also filed a complaint with the Department of Fair

1 Employment & Housing (“DFEH”), containing the same allegations, and DFEH issued a right to  
2 sue notice on July 7, 2017. RJN, Ex. A (Docket No. 20).

3 In August 2017, Plaintiff sought permission to return to work, and Ms. O’Mahony denied  
4 the request because UPS could not meet Plaintiff’s ADA accommodations. *Id.* ¶ 45. UPS’s ADA  
5 panel denied Plaintiff’s reduced workload request in November 2017 and informed Plaintiff that it  
6 did not have any alternative jobs for him. *Id.* ¶ 46.

7 On November 1, 2019, Plaintiff contacted Ms. O’Mahony and asked for a return to work at  
8 40 hours a week without any accommodations, but he did not receive a response. *Id.* ¶ 52.  
9 Plaintiff reached out to Ms. O’Mahony on two subsequent occasions in 2019, asking for a return  
10 to work without any accommodations, but did not hear back. *Id.* ¶¶ 53-54. Plaintiff filed his  
11 PAGA notice with the LWDA on June 29, 2020. RJN, Ex. D (Docket No. 20) (hereinafter  
12 “LWDA Notice”). Plaintiff stated his intent to seek a civil action against UPS based upon  
13 California Labor Code §§ 98.7, 230, 1102.5, 6310, 6400, and 6401. *Id.* at 1.

14 Plaintiff claims that UPS has used the ADA process to effectively terminate him for the  
15 complaints he made about safety concerns. *Id.* ¶ 56. Plaintiff alleges the same in his LWDA  
16 notice: “O’Mahony and UPS used the ADA process to effectively terminate [Plaintiff] for  
17 reporting his safety concerns.” LWDA Notice at 4. Plaintiff brings this suit on behalf of similarly  
18 situated employees that (1) must continue working in an unsafe environment, (2) are retaliated  
19 against when they raise concerns about the unsafe work environment, and (3) are retaliated against  
20 for bringing workplace violence complaints. Compl. ¶ 59.

21 Based on the foregoing, Plaintiff brings the following causes of action: (1) unlawful  
22 discrimination based on disability in violation of the Fair Employment and Housing Act  
23 (“FEHA”), Cal. Gov. Code § 12900, *et seq.*; (2) failure to accommodate disability in violation of  
24 FEHA; (3) failure to engage in the interactive disability accommodation process in violation  
25 FEHA; (5) retaliation for the exercise of legally protected rights in violation of Government Code  
26 § 12940(h); (6) failure to prevent and investigate discrimination and retaliation in violation of  
27 Government Code § 12940(k); (7) violation of California Labor Code § 6310 for discriminating  
28 against an employee who files a complaint or otherwise exercises their rights; (8) violation of

1 California Labor Code §§ 6400 and 6401 for failure to provide a safe working environment; (9)  
2 violation of California Labor Code § 232.5 for retaliation against an employee who discloses  
3 information about an employer's working conditions; (10) violation of California Labor Code §§  
4 1102.5(a)-(c) for adopting policies that prevented Plaintiff from disclosing information to a  
5 government agency about unlawful conduct; (13) civil penalties under PAGA; and (14) wrongful  
6 termination in violation of FEHA.

7 Plaintiff asserts claims as a PAGA representative in his seventh, eighth, ninth, and tenth  
8 causes of action, in addition to the standalone claim for PAGA penalties in his thirteenth cause of  
9 action. *See* Compl. ¶¶ 141, 158, 168, 187. Plaintiff agreed to dismiss the fourth, eleventh, and  
10 twelfth causes of action, and to dismiss United Parcel Service General Services, Co., United Parcel  
11 Service Co., Donald Embers, and Gregory Price as Defendants. Opp. to MTD at 16; Reply at 1.  
12 At issue before the Court are Plaintiff's eighth (unsafe work environment), ninth (retaliation),  
13 thirteenth (PAGA penalties), and fourteenth (wrongful termination) causes of action against the  
14 sole remaining Defendant (United Parcel Service, Inc.), along with UPS's motion to strike the  
15 PAGA claims from Plaintiff's seventh (discrimination for exercise of rights) and tenth (disclosure  
16 to government) causes of action.

## 17 II. DISCUSSION

### 18 A. PAGA Claims

19 The Court first analyzes the PAGA claims in Plaintiff's complaint. Plaintiff brings his  
20 seventh cause of action (Cal/OSHA retaliation) and tenth cause of action (whistleblower  
21 retaliation) as both individual claims and on behalf of aggrieved employees as PAGA claims.  
22 Plaintiff asserts his eighth cause of action (Cal/OSHA workplace safety) and ninth cause of action  
23 (right to disclose working conditions) solely as PAGA claims, and he seeks PAGA civil penalties  
24 in his thirteenth cause of action. UPS moves to dismiss the PAGA portions of the seventh and  
25 tenth causes of action (but not the individual claims), and it moves to dismiss the eighth, ninth,  
26 and thirteenth causes of action in their entirety.

#### 27 1. PAGA Statute of Limitations

28 When an aggrieved employee files a notice with the LWDA seeking PAGA penalties, they

1 must identify “the specific provisions of [the Labor Code] alleged to have been violated, including  
2 the facts and theories to support the alleged violation.” Cal. Lab. Code § 2699.3(a)(1)(A). The  
3 statute of limitations on filing a PAGA Notice with the LWDA is one year. *See Cal. Civ. Proc.*  
4 Code § 340(a). The one-year statute of limitations period begins when the alleged labor violations  
5 cease. *Brown v. Ralphs Grocery Co.*, 28 Cal. App. 5th 824, 839, 239 Cal. Rptr. 3d 519, 530  
6 (2018).

7 An employee’s PAGA claim may accrue (and the statute may begin to run) on the date of  
8 termination, but it may accrue earlier if the allegedly unlawful conduct ceased before termination.  
9 *See Esparza v. Safeway, Inc.*, 36 Cal. App. 5th 42, 63 n.11, 247 Cal. Rptr. 3d 875, 893 (2019)  
10 (holding that “[c]ourts … may use the end of employment as shorthand for the most recent time at  
11 which a cause of action may have accrued” but no authority suggests that “a PAGA cause of  
12 action accrues *because of* the end of employment”) (emphasis added). In *Esparza*, for instance,  
13 the end “of [Plaintiff’s] employment [was] irrelevant to the timeliness of her claim premised on  
14 violations occurring years *before* her employment ended.” *Id.* at 63 (emphasis added).

15 Here, Plaintiff’s PAGA Notice to the LWDA was filed on June 29, 2020. LWDA Notice  
16 at 1. It describes a pattern of retaliatory and harassing conduct which began on September 26,  
17 2016 (the date Plaintiff was hired) and which continued through April 2017, when Plaintiff went  
18 out on stress leave. *Id.* at 1-3. It describes the grievances Plaintiff filed with human resources,  
19 and the request for an ADA accommodation reducing Plaintiff’s workweek from 40 hours to 35  
20 hours, all of which occurred in 2017. *Id.* at 3. The Notice states that Plaintiff contacted Ms.  
21 O’Mahony for permission to return to work on **August 8, 2017**, *id.*, a request that was effectively  
22 denied.

23 In particular, Plaintiff alleges that Ms. O’Mahony unilaterally opined before the ADA  
24 panel that Plaintiff was incapable of performing an essential work function if he could not return  
25 to work at 40 hours per week. *Id.* The Notice does not provide the date on which Ms. O’Mahony  
26 provided this opinion to the panel, but it indicates that it occurred shortly after Plaintiff requested  
27 permission to return to work on August 8, 2017. *See id.* The Notice then states that Ms.  
28 O’Mahony and UPS “used the ADA process to effectively terminate [Plaintiff] for reporting his

1 safety concerns.” *Id.* at 4 (emphasis added). Plaintiff does not provide the date on which he was  
2 effectively terminated, but the Notice indicates that it occurred shortly after he sought permission  
3 to return to work on August 8, 2017. *See id.*

4 In sum, the conduct alleged in the Notice occurred more than one year before the PAGA  
5 notice was filed with the LWDA on June 29, 2020. The Notice does not allege that harassing and  
6 retaliatory conduct continued through 2018 and 2019. Thus, Plaintiff’s allegations in the June  
7 2020 LWDA Notice described a completed act, and Plaintiff did not provide any indication that  
8 the alleged Labor Code violations were ongoing.

9 Plaintiff’s unsuccessful attempt to contact Ms. O’Mahony in 2019, again seeking a return  
10 to work, cannot make up for the procedural deficiencies in his LWDA Notice. The Notice does  
11 not mention the attempted contact with Ms. O’Mahony occurring in 2019. Plaintiff’s Notice only  
12 describes the completed acts of harassment, refusal to accommodate, and effective termination, all  
13 of which occurred in 2017.<sup>1</sup>

14 Accordingly, Plaintiff’s PAGA claims are time-barred and are dismissed with prejudice.  
15 Some of Plaintiff’s PAGA claims are barred for additional reasons.

16 2. Cal/OSHA Claims

17 Plaintiff’s eighth and thirteenth causes of action are for PAGA penalties based on  
18 violations of the Labor Code’s Cal/OSHA health and safety provisions (§§ 6400, 6401), and UPS  
19 alleges that the claims fail to meet the Labor Code’s statutory requirements. Before an aggrieved  
20 employee can commence a civil action for violations of these safety provisions, she must “give

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22 <sup>1</sup> The purpose of the PAGA notice requirement “is to afford the relevant state agency, the Labor  
23 and Workforce Development Agency, the opportunity to decide whether to allocate scarce  
24 resources to an investigation, a decision better made with knowledge of the allegations an  
25 aggrieved employee is making and any basis for those allegations.” *Williams v. Superior Court*, 3  
26 Cal. 5th 531, 545-46, 220 Cal. Rptr. 3d 472, 484, 398 P.3d 69, 79 (2017). Under the notice  
27 procedure, the employer has an opportunity to submit a response to the employee’s allegations,  
28 and that response is filed with the LWDA. Cal. Lab. Code § 2699.3(a)(1)(B). Thus, the notice  
requirement serves an important function and is a “mandatory precondition to bringing a PAGA  
claim.” *Esparza*, 36 Cal. App. 5th at 59. Here, the PAGA Notice did not allege unlawful conduct  
by UPS occurring in 2019, which deprived UPS of the opportunity to respond to the 2019  
allegations, and deprived LWDA of the opportunity to decide whether to allocate its scarce  
resources to investigating such claims. Because the allegations in the LWDA Notice occurred  
between 2016 and 2017, the one-year PAGA limitations period expired in 2018.

1 notice by online filing with the Division of Occupational Safety and Health and by certified mail  
2 to the employer, with a copy to the Labor and Workforce Development Agency, of the specific  
3 provisions of Division 5 (commencing with Section 6300) alleged to have been violated, including  
4 the facts and theories to support the alleged violation.” Cal. Lab. Code § 2699.3(b)(1).  
5 Cal/OSHA is then required to investigate. Cal. Lab. Code § 2699.3(b)(2). If Cal/OSHA fails to  
6 investigate, then the employee must send a *second* notice, this time to the LWDA and the  
7 employer. Cal. Lab. Code §§ 2699.3(b)(2)(B), 2699.3(c)(1)(A). The employer then has 33 days  
8 to “cure” the alleged violation, and if the employer fails to do so, the employee may commence a  
9 civil action. Cal. Lab. Code § 2699.3(c)(2)(A).

10 UPS contends that Plaintiff never served the first notice to Cal/OSHA and did not serve the  
11 second notice to the LWDA and UPS after Cal/OSHA failed to investigate. MTD at 9-10.  
12 Plaintiff counters that, when PAGA notices are electronically filed with the LWDA, they are  
13 automatically filed concurrently with Cal/OSHA (and thus, Plaintiff’s June 29, 2020 PAGA  
14 Notice was concurrently received by Cal/OSHA). Opp. to MTD at 8. But even if the Court  
15 assumes that Plaintiff’s first notice was filed concurrently with Cal/OSHA, it is undisputed that  
16 Plaintiff never sent a second notice to the LWDA and to UPS, as required by statute. Cal. Lab.  
17 Code §§ 2699.3(b)(2)(B), 2699.3(c)(1)(A). Thus, Defendant is correct that Plaintiff failed to  
18 exhaust the statutory remedies for his eighth cause of action.

19 Because these are statutory prerequisites which Plaintiff has not followed, Plaintiff’s  
20 eighth cause of action for a Cal/OSHA workplace safety violation is **dismissed with prejudice**.

21 B. Wrongful Termination in Violation of FEHA

22 The statute of limitations to file a complaint for wrongful termination in violation of FEHA  
23 is one year from the date DFEH issues the right to sue notice. Cal. Gov. Code § 12965(b); *Hall v.*  
24 *Goodwill Indus. of S. Cal.*, 193 Cal. App. 4th 718, 730, 123 Cal. Rptr. 3d 274, 283 (2011) (“[t]he  
25 FEHA’s one-year limitations period began to run as of the date of the right-to-sue notice issued to  
26 [plaintiff], December 24, 2004 … [and plaintiff’s] civil suit, filed December 30, 2005, was  
27 untimely”). Plaintiff received his right to sue notice from DFEH on July 7, 2017. RJN, Ex. A  
28 (Docket No. 20). He alleges that he was effectively terminated by UPS for reporting his safety

1 concerns. LWDA Notice at 4. But he did not file a civil action within one year of the date DFEH  
2 issued the right to sue notice, and he is time-barred by the one-year statute of limitations. Cal.  
3 Gov. Code § 12965(b).

4 Plaintiff argues that his claims are saved by the continuing violation doctrine. Opp. to  
5 MTD at 13-14. Plaintiff cites the California Supreme Court's opinion in *Richards*, which held that  
6 "an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile  
7 work environment targeting a disabled employee, is a continuing violation if the employer's  
8 unlawful actions are (1) sufficiently similar in kind ...; (2) have occurred with reasonable  
9 frequency; (3) and have not acquired a degree of permanence." *Richards v. CH2M Hill, Inc.*, 26  
10 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 106, 29 P.3d 175, 190 (2001).

11 This doctrine does not apply to Plaintiff's claims. Plaintiff has not worked as an employee  
12 at UPS since 2017. Plaintiff alleges, in both the complaint and the LWDA Notice, that UPS  
13 effectively terminated him as retaliation for reporting unsafe working conditions. *See* Compl. ¶  
14 56; LWDA Notice at 4. Because UPS made clear to Plaintiff that further efforts at  
15 accommodating his disability with a reduced workload would be futile, Plaintiff was  
16 constructively discharged. Thus, the alleged Labor Code violations by UPS were consummated,  
17 and the doctrine of continuing violations does not save the claims from the limitations bar. *Cf.*  
18 *Richards*, 26 Cal. 4th at 823 (holding that, in the context of FEHA claims, "[i]f the employer has  
19 made clear in word and deed that the employee's attempted further reasonable accommodation is  
20 futile, then the employee is on notice that litigation, not informal conciliation, is the only  
21 alternative for the vindication of his or her rights").

22 Accordingly, the Court finds that Plaintiff's claim for wrongful termination in violation of  
23 FEHA is barred by the one-year limitations period.

24 C. Wrongful Termination in Violation of Public Policy

25 At the motion hearing, Plaintiff's counsel asked for leave to amend the complaint to bring  
26 a claim for wrongful termination in violation of public policy. In *Tamony v. Atl. Richfield Co.*, 27  
27 Cal. 3d 167, 170, 164 Cal. Rptr. 839, 840, 610 P.2d 1330, 1331 (1980), the California Supreme  
28 Court held that "when an employer's discharge of an employee violates fundamental principles of

1 public policy, the discharged employee may maintain a tort action and recover damages  
2 traditionally available in such actions.” *Id.* The elements of a claim for wrongful termination in  
3 violation of public policy are “(1) an employer-employee relationship, (2) the employer terminated  
4 the plaintiff’s employment, (3) the termination was substantially motivated by a violation of  
5 public policy, and (4) the discharge caused the plaintiff harm.” *Yau v. Allen*, 229 Cal. App. 4th  
6 144, 154, 176 Cal. Rptr. 3d 824, 831 (2014). *Cf. Garcia-Brower v. Premier Auto. Imps. of CA,*  
7 *LLC*, 55 Cal. App. 5th 961, 973, 269 Cal. Rptr. 3d 856 (2020) (same).

8        The Court notes, however, that some courts have held that an employee need not allege  
9 termination to bring a *Tamency* claim. Employees who experience adverse consequences in the  
10 workplace, such as demotions or suspensions, may bring *Tamency* claims even in the absence of  
11 termination. *See Williams v. Sacramento River Cats Baseball Club, LLC*, 40 Cal. App. 5th 280,  
12 288, 253 Cal. Rptr. 3d 129, 135 (2019) (“courts have recognized the claim’s applicability to  
13 employees who have experienced adverse employment actions, such as demotions or  
14 suspensions”); *Garcia v. Rockwell Internat. Corp.*, 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr.  
15 490, 492 (1986) (“an employee can maintain a tort claim against his or her employer where  
16 disciplinary action has been taken against the employee in retaliation for the employee’s whistle-  
17 blowing activities, even though the ultimate sanction of discharge has not been imposed”)  
18 (internal quotation marks omitted).

19 Because Plaintiff alleges that he suffered adverse consequences for reporting unsafe  
20 working conditions, the Court will grant Plaintiff leave to amend to allege a new cause of action  
21 for a *Tamency* claim.

### III. CONCLUSION

23 The Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's PAGA and Cal/OSHA  
24 claims, **with prejudice**, for failure to comply with the limitations period and statutory  
25 prerequisites. Accordingly, the eighth cause of action (Cal/OSHA workplace safety), ninth cause  
26 of action (right to disclose working conditions), and the thirteenth cause of action for PAGA civil  
27 penalties are dismissed with prejudice, as are the PAGA portions of the seventh cause of action  
28 (Cal/OSHA retaliation), and the tenth cause of action (whistleblower retaliation). The Court

1 **GRANTS** Defendants' Motion to Dismiss Plaintiff's fourteenth cause of action for wrongful  
2 termination in violation of FEHA **without prejudice**, and it **GRANTS** Plaintiff leave to amend to  
3 allege a *Tamency* claim for wrongful termination in violation of public policy.

4 This order disposes of Docket No. 18.

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6 **IT IS SO ORDERED.**

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8 Dated: May 6, 2021

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EDWARD M. CHEN  
United States District Judge

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United States District Court  
Northern District of California